No. 21706

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

v.

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARDELL LEE, infants; and BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants,

Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEES WITH APPENDIX AND SUPPLEMENT

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BRIEF FOR APPELLEES

Jurisdictional Statement

Appellees respectfully refer to and adopt the jurisdictional statement presented by appellant's brief, pages 1-2.

Statement of the Case[1]

This action was brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 *et seq.*, to recover wrongful death

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[1] Appellant's statement of the case erroneously asserts appellees conceded the subject deaths were incident to service, inaccurately characterizes the opinion of the district court and omits pertinent matters (Brief, pp. 2-3). In accordance with Rule 18, subdivision 3 of the Rules of this Court, appellees present their statement to controvert that of appellant.

damages for the benefit of the widows and children of Marine Corps Sergeant James E. Lee and Corporal Ralph E. White (A1-A4).[2]

On June 25, 1965, an aircraft operated by the Air Force Military Air Transport Service crashed shortly after take-off near Santa Ana, California and killed appellees' decedents who were aboard as passengers (A1-A4).

This crash was caused by the negligence of the "Federal Aviation Agency, a division of the Government separate and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force that was operating the aircraft" (A2-A3). The F.A.A.'s civilian employees negligently instructed the plane to follow a departure procedure that prescribed inadequate clearance over the terrain near the airport (A2-A3). No claim or suggestion has ever been made by appellees of negligence by the Marine Corps, the Air Force, any military service or the Department of Defense (A1-A4, R24-31, R71-76).[3]

Thus, this suit involves the deaths of military men on duty caused by the negligence of F.A.A. employees who were not in the military service or in a military relationship to decedents.

Appellees specifically alleged that their decedents were on active duty at the time of the crash (A1, A3). The motion to dismiss was based upon appellant's conclusion that "active duty" is synonymous with "incident to service" (R11, 13, 39). In opposition, appellees demonstrated that incident to service is defined to apply when a military

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[2] Parenthetical references preceded by "A" identify the pages of appellees' Appendix. It consists of the complaint (A1-A4), and the Memorandum of Decision and Order (A5-A12) which denied appellant's motion to dismiss. The district court's opinion is reported at 261 F. Supp. 252.

[3] Parenthetical references preceded by "R" identify the page numbers of the Record on Appeal.

man on active duty sustains injury by the negligence of others in military service (R27-28). As an exception to the general rule of Government liability, incident to service was shown to serve the purpose of preserving the military relationship between all servicemen on duty (R27-31). Since neither the definition nor the purpose of the exception applied to the facts, appellees sought denial of the motion.

The district court held that application of the incident to service exception depended upon whether the deaths were caused by activities involving an official military relationship between the negligent person and the claimant (A11). Since the F.A.A. was not a part of the military and the relationship to the decedents was the same as that between the F.A.A. and all passengers, the court denied the motion and held liability would be imposed upon the Government if appellees could prove the negligence alleged (A12).

Despite this, appellant's statement and argument assert that the subject deaths "concededly" and "undisputed[ly]" were incident to service (Brief, pp. 3 and 5, respectively).[4] Appellees have consistently stated the contrary (R27, R30-31). These assertions by appellant beg the precise question at issue.

Question Presented

Whether the Government is liable under the F.T.C.A. or the incident to service liability exception is applicable when civilian employees of the F.A.A., an independent nonmilitary agency having no military relationship to aircraft passengers who are military men on active duty, negligently cause the deaths of said servicemen.[5]

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[4] To support its erroneous assertions, appellant cites its own motion (R6-7) and brief below (R10-13).

[5] The district court was the first and is to date the only court to consider, discuss or decide the issue presented, or any similar question. Thus, the issue at bar involves a decision of first impression.

Statute Involved

The pertinent parts of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2674, are presented on page 4 of appellant's brief and respectfully adopted here.

It is, however, pertinent to add that 28 U.S.C. § 2680 provides:

> "Exceptions.
>
> The provisions of this chapter and section 1346(b) of this title shall not apply to —"

thirteen different situations. None of these exceptions to liability apply at bar. The Act contains no incident to service exception.

Summary of Argument

Aside from the statutory exceptions, the Federal Tort Claims Act language and congressional history impose liability upon the Government for its negligence in "any claim", not "any claim but that of servicemen", *Brooks* v. *United States,* 337 U. S. 49, 51 (1949).

None of the statutory exceptions applies. A liability exception named "incident to service" was judicially created and applies only when military men "on active duty and not on furlough sustained injury due to negligence of others in the armed forces", *Feres* v. *United States,* 340 U. S. 135, 138 (1950). The reasons justifying the incident to service exception are the "special relationship of the soldier to his superiors" and the maintenance of "discipline", both of which would be adversely affected by damage suits arising from "negligent orders given or negligent acts committed in the course of military duty", *United States* v. *Brown,* 348 U. S. 110, 112 (1954). "In the last analysis, Feres seems best explained by" said reasons

for the exception, *United States* v. *Muniz,* 374 U. S. 150, 162 (1963). This is the most recent explanation of *Feres'* scope by the Supreme Court.

Neither the holding of *Freres* (as distinguished from its alleged *obiter dictum*) nor the reasons justifying the existence of the incident to service exception apply to the facts at bar. The negligent F.A.A. employees were not "in the armed forces"; therefore, the exception is inapplicable. Beyond this, the F.A.A. employees were not in a "special relationship" to decedents comparable to that of the "soldier to his superiors", were not acting "in the course of military duty"; and were part of an independent civilian agency separate from the military establishment and the Department of Defense. Thus, there is no reason to apply or enlarge the definition or the scope of the exception. That prerogative rests with Congress or the Supreme Court.

The relationship between the F.A.A. and decedents was non-military and identical to that between the F.A.A. and all aircraft passengers. Thus, for deaths of passengers caused by the negligence of the F.A.A., the Government is liable under the Federal Tort Claims Act for wrongful death damages, *Ingham* v. *United States,* 373 F. 2d 227 (2d Cir.), *cert. denied,* —— U. S. —— (November 6, 1967); *cf. United States* v. *Furumizo,* 381 F. 2d 965 (9th Cir. 1967).

ARGUMENT

POINT I

When negligent civilian employees of the Federal Aviation Agency, having no military or similar relationship to aircraft passengers who are active duty servicemen, cause their deaths, the incident to service exception is inapplicable and the Government is liable under the F.T.C.A.

In 1946, shortly after the close of World War II, the Federal Tort Claims Act was enacted. It imposed liability upon the Government for the negligence of its employees, 28 U.S.C. § 1346(b) and 2674. The general rule of liability made no distinction with regard to the status of the claimant, and, therefore, gave the same rights to the public and military personnel. The Act provided for exceptions to liability in a number of specified circumstances, 28 U.S.C. § 2680. None of the statutory exceptions existing from the time of the F.T.C.A. enactment to the present apply to the facts at bar. The statute has never contained an "incident to service" or similar exception to liability.

The first case under the Tort Claims Act to reach the United States Supreme Court was *Brooks* v. *United States,* 337 U. S. 49 (1949). It was concerned with two claims arising from the death of and personal injury sustained by Army servicemen on furlough who were involved in a vehicular collision with an Army truck negligently driven by a civilian employee of the Army. The Supreme Court held the Government liable by analyzing the Act and its legislative history:

> "The statute's terms are clear. They provide for District Court jurisdiction over *any* claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve

> exceptions [citations]. None exclude petitioners' claims. . . . Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." 337 U. S. at 51.

The last quoted sentence refers to 28 U.S.C. § 2680 which provides that the Government shall not be liable in "(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" and "(k) Any claim arising in a foreign country." The district court at bar considered these statutory exceptions and stated that they "would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities" (A6).

The Court in *Brooks* then referred to the legislative history:

> "More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. *When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped.* What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act [citation], compensation for injury or death occurring in the first World War. HR 181, 79th Cong 1st Sess. When HR 181 was incorporated into the Legislative Reorganization Act, *the last vestige of the exclusion for members of the armed forces disappeared.*" 337 U. S. at 51-52. (Emphasis added.)

The incident to service exception to the Act was judicially created by *Feres* v. *United States,* 340 U. S. 135 (1950). It decided three cases, *Feres, Jefferson* and *Griggs,* in the same opinion. In posing the issue, the Supreme Court held:

> "The common fact underlying the three cases is that each claimant while *on active duty* and not on furlough *sustained injury due to negligence of others in the armed forces.*" At page 138. (Emphasis added.)

The Court further held that federal law applied exclusively and declined to refer to the state law of the place where the wrongful act or omission occurred on the grounds:

> "That the geography of an injury should select the law to be applied to his tort claims makes no sense. . . . It would hardly be a rational plan of providing for *those disabled in service by others in service* to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value." At page 143. (Emphasis added.)

Having posed the issue for decision and resolved that federal not state law governed with *precise* references to servicemen injured by *other servicemen, Feres* denied liability. Under the facts and the issue before the Court, as well as their characterization in the two quotations presented above, incident to service was thus defined and applied to active duty servicemen injured by the negligence of other servicemen. Appellees respectfully contend that this, and only this is the *Feres* holding.

Appellant, citing *Feres,* contends that incident to service relates exclusively to and would bar recovery by the military man on duty injured by the negligence of a non-military civilian employee of the Government. Since *Feres* was not presented with such facts for decision, to uphold appellant's contention would require: an expansion

of *Feres* beyond its factual scope and holding; a finding of the presence of *obiter dictum* in *Feres;* and reliance upon such *dictum* to deny liability at bar. It is respectfully submitted, particularly in view of *Brooks, Brown* and *Muniz,* that expansion of *Feres* is not warranted by fact, reason, equity or law, that *Feres* did not enunciate *dictum,* and that, if it exists, reliance thereon is also not warranted. Expansion and application of *Feres* to the facts at hand should be an issue to be specifically resolved by Congress or the Supreme Court.

Appellant, to support its contention, repeatedly cites the final paragraph of *Feres* and the phrase therein which precluded liability "to servicemen where the injuries arise out of or are in the course of activity incident to service". 340 U. S. at 146. Appellees submit that this final phrase corresponds to and is not different from the earlier characterizations in the *Feres* opinion: military men "on active duty [injured by] the negligence of others in the armed forces" and "disabled in service by others in service". 340 U. S. at 138 and 143, respectively. Even if *dictum* was enunciated, no justification for reliance thereon has been suggested by appellant. The district court properly viewed the final phrase as no longer authoritative (A6). The court did not conclude that the *Feres* holding lacks authority.

In addition to the language of *Feres,* due consideration should be given to the reasons justifying the incident to service exception to the general rule of Government liability.

In the *Griggs* case, one of the three decided by *Feres,* the Government's brief to the Supreme Court stated the reasons,[6] none of which apply to the facts at bar:

> ". . . the need for avoiding application of state laws to military matters, . . . the desirability of *avoiding*

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[6] The briefs submitted by the Government in the *Jefferson* and *Feres* cases referred to the reasons presented by the *Griggs* brief.

> *judicial review of military orders,* and . . . the postulate that *military discipline must not be impaired.*
>
> * * *
>
> His being on active duty in the armed forces required him to submit to that operation by an Army surgeon *only because of the military relationship* between the two of them." At pages 4 and 26. (Emphasis added.)

In its brief here, the appellant agrees that "the rule of non-liability to servicemen injured 'incident to service' is designed to avoid interference with military discipline . . ." (Brief, p. 10). This admission is pertinent. Imposition of liability upon the Government for negligence of the F.A.A. cannot interfere in any way with military discipline. After quoting *Feres'* final phrase, the appellant asserts that the Supreme Court has never limited *Feres* to situations threatening military discipline, *ibid.* The contrary is true.

The limited scope of and reasons for the incident to service exception were presented by *United States* v. *Brown,* 348 U. S. 110 (1954), and *United States* v. *Muniz,* 374 U. S. 150 (1963).

In *Brown,* a veteran suffering from a knee injury, which occurred when on active duty, was negligently treated after discharge by a veterans administration hospital. In upholding the claim, the Supreme Court analyzed *Feres*:

> "The Feres decision involved three cases, in each of which the injury, for which compensation was sought under the Tort Claims Act, occurred while the serviceman was on active duty and not on furlough; and *the negligence alleged in each case was on the part of other members of the Armed Forces.* . . . The peculiar and *special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline,* and the extreme results that might obtain if suits under the Tort Claims Act were allowed for

> negligent orders given or *negligent acts committed* in *the course of military duty,* led the Court to read that Act as excluding claims of that character." 348 U. S. at 111-112. (Emphasis added.)

The most recent explanation by the Supreme Court of the incident to service exception was presented by Mr. Chief Justice Warren in a unanimous opinion in *Muniz.* An inmate of a federal prison was injured as a result of the negligence of prison guards and officials. In upholding the imposition of liability upon the Government, *Feres* was discussed at length and then characterized:

> "In the last analysis, Feres seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline and . . . orders given or . . . *acts committed in the course of military duty, United States* v. *Brown.*" 374 U. S. at 162. (Emphasis added.)

Thus, *Brown* and *Muniz* recognized that *Feres'* holding was confined to servicemen injured by servicemen. Furthermore, *Brown* and *Muniz* limited to scope of *Feres* to situations embraced by the reasons for the exception.

The approach of *Muniz* to exemptions from liability of the Government was also presented:

> "The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity, narrow the remedies provided by Congress. As we said in [citation] 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.' " 374 U. S. at 165-166.

To summarize all of the previous discussion, *Feres,* standing alone, established one basic proposition: the incident to service exception precludes Government liability when a military man on active duty is caused injury or death by the negligence of another in military service. Correspondingly, the exception does not apply when a military man on duty is caused injury or death by the negligence of others *not* in the "armed forces" and *not* in the military "service". 340 U. S. at 138 and 143. *Brown* and *Muniz* reaffirmed this basic proposition and its corollary, and, in addition, articulated the reasons justifying the exception, thereby limiting its scope and application to cases where a military relationship exists between the injured or deceased serviceman and the tortfeasor upon whose negligence the claim is founded. 348 U. S. at 111-112, and 374 U. S. at 162. *Brooks* established that the F.T.C.A. allows and Congress intended military men to recover, unless embraced by a liability exception. 337 U. S. at 51-52. The *Muniz* view was that exemptions from Government liability should be specified only by Congress and then narrowly applied. 374 U. S. at 165-166.

Feres' holding, *standing alone and fully authoritative,* compels denial of appellant's motion. The negligent F.A.A. employees were not in the armed forces or in military service. Furthermore, the F.A.A. was a totally independent civilian agency, 49 U.S.C. § 1341(a). The decedents, as all military men, were in a branch of service within the Department of Defense, 50 U.S.C. § 401. The F.A.A. and the Department were independent and not subject to the command of each other. The same is true of the decedents and the negligent F.A.A. employees.

Thus, it is not necessary to conclude that the *Feres* holding has been further limited or modified by *Brown* or *Muniz* in order to affirm denial of the motion to dismiss. In Point II, *infra* at pages 14-19, appellees will demonstrate that every incident to service case cited by appellant is

consistent with and fully explained by the basic holding of *Feres.*

Beyond this position, appellees respectfully contend that *Brooks, Brown* and particularly *Muniz* limit the scope and application of the incident to service exception to cases where a military relationship exists between the serviceman and the negligent civilian employee. The district court's reasoned analysis came to this conclusion after considering the cases and the same arguments presented here by appellant. None of the reasons justifying the liability exception apply to the instant facts. There was no military relationship between the decedents and the negligent F.A.A. employees. Their relationship was not comparable to that of the soldier to his superior, another military man, or, indeed, a civilian in position of command or position similar to decedents' rank. Military discipline was not involved. Affirmance of the denial of the motion could not affect military relationships or discipline, or be deemed to constitute judicial review of military orders or activities. Rather, the relationship existing at bar was identical to that between the F.A.A. and passengers aboard all aircraft; therefore, the same F.T.C.A. liability should obtain. *Ingham* v. *United States,* 373 F. 2d 227 (2d Cir.), *cert. denied,* —— U. S. —— (November 6, 1967); *cf. United States* v. *Furumizo,* 381 F. 2d 965 (9th Cir. 1967). Since the reasons justifying incident to service are inapplicable, the exception should not apply.

No sound reason exists to expand the application of *Feres* beyond the facts with which it was concerned.

POINT II

Appellant's citations are consistent with and explained by *Feres'* holding that the exception applies to active duty servicemen injured by other military men, as well as by the *Brown, Muniz* and district court conclusion that the exception applies only when a military relationship exists.

Appellant cites a number of Courts of Appeals to support its contention that all active duty servicemen injured by any negligent Government employee fall victim to the incident to service exception.

Appellees respectfully submit that the cases cited are consistent with and fully explained by *Feres'* holding that the exception applies to active duty servicemen injured by other military men. The cases establish a pattern corroborating the holding in *Feres.* They can also be consistently explained by the military relationship restriction placed upon *Feres* by *Brown* and *Muniz,* and followed by the district court in the instant case. Furthermore, no case has been found which discusses or decides the question at issue.

Callaway v. *Garber,* 289 F. 2d 171 (9th Cir.), *cert. denied,* 368 U. S. 874 (1961), involved the death of an Air Force sergeant journeying by car to a training school pursuant to military orders. A collision and his death were caused by the negligence of a Navy recruiting officer who was performing his military duties. This Court held that the journey to the school

> ". . . was as much a part of his duty as the training itself. *The person responsible for the injury was another serviceman* following out and in the course of his duties." At page 173. (Emphasis added.)

The incident to service exception was applied and the denial of Government liability affirmed. Both the claim-

ants and the negligent person were "on active duty" and "in the armed forces", *Feres* v. *United States,* 340 U. S. 135, 138 (1950); therefore, *Callaway* is consistent with, explained by and corroborative of the *Feres* holding.

With regard to the military relationship restriction imposed upon *Feres,* this Court, after considering *United States* v. *Brown,* 348 U. S. 110 (1954), particularly the "basic reasons underlying" the exception, concluded:

> "The instant case can find no shelter within those reasons, since the negligent and the injured parties here were members of different branches of the service and were engaged in entirely different and unconnected activities at the time of the accident." 289 F. 2d at 173-174.

Appellees most respectfully suggest that, despite the different branches and unconnected activities, since Callaway and Garber were military men on official duty, their actions were subject to scrutiny by superiors, and subject to the Uniform Code of Military Justice, 10 U.S.C. § 801, *et seq.* Military discipline was a factor involved. The litigation, therefore, affected military relationships and discipline. In any event, the *subsequent* unanimous opinion in *United States* v. *Muniz,* 374 U. S. 150 (1963), limited *Feres* "in the last analysis" (at p. 162) to the military relationship situation. *Muniz* also viewed exemptions from Government liability with disfavor, and as the prerogative of Congress, and subject to narrow application. Thus, if the alleged *dictum* in *Feres* is "no longer authoritative" (A6) by virtue of *Muniz,* then *Callaway* may properly be examined further and is not inconsistent with affirmance at bar on the military relationship analysis.

Appellant also cites three cases which can be considered together because they involve common facts. *Archer* v. *United States,* 217 F. 2d 548 (9th Cir. 1954), *cert. denied,* 348 U. S. 953 (1955); *United States* v. *Carroll,* 369 F. 2d

618 (8th Cir. 1965); and *Sheppard* v. *United States,* 369 F. 2d 272 (3d Cir. 1966), *cert. denied,* 386 U. S. 982 (1967), involved servicemen on active duty. In each, the claim was based upon the negligence of other members of the armed forces. The three cases, therefore, form the familiar pattern and are embraced by the basic proposition—holding:

> "each claimant while on active duty . . . sustained injury due to negligence of others in the armed forces." *Feres* v. *United States,* 340 U. S. 135, 138 (1950).

In *Archer,* this Court affirmed the grant of the Government's motion for summary judgment on the ground that the deceased West Point cadet "was in line of duty" and "under military discipline on an army plane under control of a superior officer"; therefore, the incident to service exception applied to preclude recovery for the negligence of the army's pilot. 217 F. 2d at 551. In *Carroll,* the "plaintiff was a naval reservist traveling in uniform to a weekend drill with other members of his military unit." 369 F. 2d at 619. He was injured while a passenger aboard a naval aircraft negligently operated by a navy pilot on active duty. Upon "entering the plane, however, the reservists were under the command of the naval officers in charge of the plane." At page 620. The court held the plaintiff was on active duty and a military relationship existed between him and the crew; therefore, it exempted the Government from liability for the crew's negligence. In *Sheppard,* the same accident as the one at bar, the plaintiffs claimed negligence by military men. The court affirmed dismissal of the complaint which alleged:

> "As a result of the negligence, carelessness and recklessness of defendant's agents, servants, and employees, to wit, members of the United States Air Force and others, in the maintenance, operation, and control of said aircraft, said aircraft crashed on June 25, 1965

in the state of California, shortly after takeoff from El Toro Air Force Base." Paragraph 4 of the Complaint, Plaintiffs-Appellants' Appendix, page 2a.

Neither the complaint nor the plaintiffs-appellants' brief claimed negligence by the F.A.A. or any other civilian employees. The claims were founded upon Air Force negligence and the contentions that *Feres* was either overruled or so limited as to allow suits between military men in different branches of service who were not in a command relationship. The court held *Feres'* validity was not destroyed by subsequent decisions. *Sheppard's* holding, therefore, is consistent with and explained by the *Feres* holding. The *Sheppard* court, however, was not presented with the question at bar or the military relationship issue of a serviceman vis-a-vis a civilian or an F.A.A. employee of the Government.[7] The *Sheppard* plaintiffs' claim that no military relationship existed between the decedents and the Air Force crew is not substantiated by fact or law. *Archer* and *Carroll* both held that military passengers aboard a military aircraft were subject to the command of the crew.

In *Layne* v. *United States*, 295 F. 2d 433 (7th Cir. 1961), *cert. denied*, 368 U. S. 990 (1962), the court affirmed dismissal of a complaint upon motion for summary judgment. Decedent was an Air National Guard pilot who was killed by the negligence of F.A.A. employees. Aside from a procedural problem, the sole issue presented, briefed, discussed and decided was whether decedent was on active duty with the United States. Plaintiff contended the decedent was on duty with the National Guard, not the

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[7] Appellees respectfully present in the Supplement papers in further *Sheppard* proceedings which may not be readily available to this Court. Pages S1-S5 set forth a new complaint filed after the petition for certiorari was denied. Government's motion and supporting and opposing papers appear at S6-S12. The court's order is at S13.

United States. The court held the contrary was the fact. An examination of plaintiff Layne's brief discloses that the sole question was whether decedent was on active duty with the federal government. At no time did plaintiff assert that an active duty serviceman can recover for F.A.A. negligence.[8] In addition, the basic proposition-holding of *Feres* was not raised by plaintiff or discussed by the court. Due undoubtedly to plaintiff's failure to discuss the precise holding of *Feres,* the court assumed, without deciding, that a finding that decedent was on duty in the service of the United States was dispositive. As demonstrated at bar, such a finding constituted resolution of a threshold question (like *Brooks*) which does not decide or affect the question presented here.

Four additional cases relating to incident to service were cited by appellant in footnotes. These cases commonly involved claims by servicemen on active duty injured by the negligence of other servicemen on duty.[9]

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[8] In these circumstances, it is hardly justifiable for appellant at bar to state that the district court's view of *Feres* was "considered and rejected" by *Layne* (Brief, pp. 6-7).

[9] In *United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379 (9th Cir.), *petition for cert. dismissed,* 379 U. S. 951 (1964), active duty military men were killed when an aircraft, in which they were riding as passengers, collided in mid-air with a military jet piloted by an Air Force officer. No action was commenced against the Government by the estates of the servicemen-passengers. In *Chambers* v. *United States,* 357 F. 2d 224 (8th Cir. 1966), the decedent-serviceman drowned, while on duty training for underwater activities and subject to the command of his superiors, as a result of military negligence. In *Zoula* v. *United States,* 217 F. 2d 81 (5th Cir. 1954), several Army servicemen on duty at a military post were injured as a result of the negligence of another Army serviceman who was driving an Army ambulance. Finally, in *Van Sickel* v. *United States,* 285 F. 2d 87 (9th Cir. 1960), a Marine Corps sergeant on active duty died as a result of malpractice committed by a Navy doctor at a naval hospital. The decedent's widow attempted to maintain suit under California statutes rather than the F.T.C.A.

Thus, all of the incident to service cases cited by appellant establish a specific pattern consistent with, explained by and supportive of appellees' alternative positions: for the *Feres* holding to apply, the active duty decedents' deaths must be caused by the negligence of another military serviceman, not by the non-military civilian employees of the F.A.A.; the incident to service exception applies when a military or similar command relationship exists between the decedent and the negligent Government employees, no such relationship existing at bar.

No cited case or any that appellees have found discusses or decides the question presented at bar, except the considered opinion of the district court below.

Appellant seeks to broaden the incident to service exception and limit the scope of Government liability. It is respectfully submitted, therefore, that the Government is charged with and has not sustained the burden of persuasion by reference to pertinent authority or sound reason. Appellees submit that the facts at bar, reason, equity and authority justify the present containment of the exception to the general rule of liability. To enlarge the scope of the exception is the prerogative of Congress or the Supreme Court.

POINT III

Since none of the exclusive remedy statutes benefit appellees, they are entitled to recover under the F.T.C.A.

Appellant cites seven cases arising under various exclusive remedy statutes in an attempt to suggest that appellees are affected by them in some manner not yet articulated. The statutes cited are inapplicable to and do not benefit the appellees.

Appellant, however, has cited no exclusive remedy statute which grants benefits to the widow and children of each decedent. No such statute exists.

Specifically, the Government refers to *O'Leary* v. *Brown-Pacific-Maxon,* 340 U. S. 504 (1951), involving the Longshoremen's and Harbor Workers' Compensation Act; *United States* v. *Demko,* 385 U. S. 149 (1966), involving the Federal Prisoners Compensation Act; *United States* v. *Forfari,* 268 F. 2d 29 (9th Cir.), *cert. denied,* 361 U. S. 902 (1959), involving a state workmen's compensation act; *Patterson* v. *United States,* 359 U. S. 495 (1959) and *Johansen* v. *United States,* 343 U. S. 427 (1951), both involving the Federal Employees Compensation Act which specifically applies only to civilian employees of the Government; and *Preferred Ins. Co.* v. *United States,* 222 F. 2d 942 (9th Cir.), *cert. denied,* 350 U. S. 837 (1955) and *Zoula* v. *United States,* 217 F. 2d 81 (5th Cir. 1954), both involving the Military Personnel Claims Act which provides benefits solely for property damage.

When benefits are obtained under a veterans act or any other statute which does not specifically provide exclusivity of remedies, no election of remedies can be implicitly imposed. In *Brooks* v. *United States,* 337 U. S. 49 (1949), the Court stated:

> "Unlike the usual workmen's compensation statute [citation], there is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy. [Citation.] Nor did Congress provide for an election of remedies, as in the Federal Employees' Compensation Act [citations]. We will not call either remedy in the present case exclusive, nor pronounce a doctrine of election of remedies, when Congress has not done so." At page 53.

Accord, United States v. *Brown,* 348 U. S. 110 (1954).

The irrelevance of the exclusive remedy cases cited by appellant is thus demonstrable.

CONCLUSION

For the reasons stated, the order appealed from should be affirmed.

Respectfully submitted,

SAMUEL M. HECSH,
Attorney for Appellees,
110 West C Street,
San Diego, California 92101.

714-234-3441

Of Counsel:

KREINDLER & KREINDLER,
by Lee S. Kreindler,
Milton G. Sincoff,
George E. Farrell,
99 Park Avenue,
New York, New York 10016.

212-687-8181

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

November 22, 1967.

s/ Milton G. Sincoff,
Milton G. Sincoff,
Counsel for Appellees,
99 Park Avenue,
New York, New York 10016.

Affidavit of Service

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

MILTON G. SINCOFF, being duly sworn, deposes and says:

That on November 22, 1967, he caused three copies of the foregoing Brief for the Appellees with Appendix and Supplement to be served by air mail, postage prepaid, upon counsel for Appellants:

William M. Byrne, Jr., Esq.
United States Attorney
600 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

and

Carl Eardley, Esq.
Acting Assistant Attorney General
Morton Hollander, Esq.
Leonard Schaitman, Esq.
Attorneys
United States Department of Justice
Washington, D. C. 20530

s/ MILTON G. SINCOFF,
Milton G. Sincoff,
Counsel for Appellees,
99 Park Avenue,
New York, New York 10016.
212-687-8181

Sworn to before this this
22nd day of November, 1967

GERALD A. ROBBIE,
Notary Public,
State of New York,
No. 31-8591670,
Qualified in New York County,
Term Expires March 30, 1968.

[SEAL]

APPENDIX

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF CALIFORNIA,

CENTRAL DIVISION.

ARDELL LEE, individually, as Administratrix of the Estate of JAMES E. LEE, deceased, and as the Mother, Next Friend, Natural Guardian and Representative of REGINALD A. LEE, RONALD H. LEE and ARNELL LEE, infants,

and

BETTY MOORE, individually, as Administratrix of the Estate of RALPH E. WHITE, deceased, and as Mother, Next Friend, Natural Guardian and Representative of RALPH M. WHITE and JON E. WHITE, infants,

Plaintiffs,

against

UNITED STATES OF AMERICA,

Defendant.

Plaintiffs, by their attorney, Samuel N. Hecsh, complaining of the defendant, respectfully allege:

A FIRST CLAIM FOR THE WRONGFUL DEATH OF JAMES E. LEE

FIRST: Jurisdiction is founded on 28 United States Code, Section 1346, commonly referred to as the Federal Tort Claims Act.

SECOND: On the 25th day of June, 1965, Sergeant James E. Lee, deceased, then on active duty in the United States

Marine Corps, was a passenger aboard a certain Boeing C-135A aircraft, 60-373A, being operated by the Military Air Transport Service, United States Air Force.

THIRD: On the 25th day of June, 1965, said aircraft crashed in the vicinity of Santa Ana, California.

FOURTH: At all times mentioned hereafter, defendant United States of America, through its Federal Aviation Agency, a division of the Government separate and apart from either the United States Marine Corps in which the decedent was serving, or from the United States Air Force that was operating the aircraft, owned, operated and controlled certain radar, and certain electronic and radio facilities which were used by it to control, advise, direct and inform aircraft departing the Marine Corps Air Station, El Toro, Santa Ana, California.

FIFTH: At all times mentioned hereinafter, defendant United States of America through its Federal Aviation Agency, developed and approved Standard Instrument Departures (SIDs), and other navigational data, which were used by aircraft departing the Marine Corps Air Station, El Toro, Santa Ana, California.

SIXTH: On the 25th day of June, 1965, prior to and at the time of said crash, the previously described aircraft of the United States Air Force was departing the Marine Corps Air Station, El Toro, Santa Ana, California, while receiving control, advice, and direction from defendant United States of America's Federal Aviation Agency employees who were acting within the scope of their employment, and in accordance with the Standard Instrument Departure, and other navigational data, which had been prepared and approved by the defendant's Federal Aviation Agency employees who were acting within the scope of their employment.

SEVENTH: Said crash was caused by the negligence of defendant United States of America's Federal Aviation Agency in carelessly operating, maintaining, and controlling the departure of said aircraft from the Marine Corps Air Station, El Toro, Santa Ana, California, and in carelessly controlling, advising, directing and informing said aircraft of dangerous terrain in the vicinity of the airport, in providing a departure procedure which incorporated inadequate terrain clearance information, and in other respects.

EIGHTH: Said crash caused the death of James E. Lee, deceased, who was and is survived by his wife, plaintiff Ardell Lee, and their three infant children, Reginald A. Lee, Ronald H. Lee and Arnell Lee.

NINTH: Solely as a result of the death of James E. Lee, deceased, his widow and their three infant children have sustained pecuniary injuries, including loss of support, services, paternal guidance and training, and the prospects of inheritance of future accumulations.

TENTH: By reason of these premises the plaintiff Ardell Lee has been damaged in the sum of Two Hundred Thousand ($200,000) Dollars.

A SECOND CLAIM FOR THE WRONGFUL DEATH OF RALPH E. WHITE

ELEVENTH: Plaintiff Betty Moore realleges each statement in paragraphs "First", "Third", "Fourth", "Fifth", "Sixth" and "Seventh".

TWELFTH: On the 25th day of June, 1965, Corporal Ralph E. White, deceased, then on active duty in the United States Marine Corps, was a passenger aboard said aircraft.

THIRTEENTH: Said crash caused the death of Ralph E. White, deceased, who left surviving him his wife, plaintiff Betty Moore and their two infant children, Ralph M. White and Jon E. White.

FOURTEENTH: Solely as a result of the death of Ralph E. White, deceased, his widow and their two infant children have sustained pecuniary injuries, including loss of support, services, paternal guidance and training, and the prospects of inheritance of future accumulations.

FIFTEENTH: By reason of these premises, plaintiff Betty Moore has been damaged in the sum of Two Hundred Thousand ($200,000) Dollars.

WHEREFORE, plaintiff Ardell Lee demands judgment against the defendant on the First Claim in the sum of Two Hundred Thousand ($200,000) Dollars; plaintiff Betty Moore demands judgment against the defendant on the Second Claim in the sum of Two Hundred Thousand ($200,000) Dollars, together with interest, costs and disbursements of this action.

Dated: San Diego, California, June 21, 1966.

/s/ SAMUEL N. HECSH,
Samuel N. Hecsh,
Attorney for the Plaintiffs,
1106 Bank of America Building,
San Diego, California 92101.
234-3442

Of counsel,

KREINDLER & KREINDLER,
99 Park Avenue,
New York, New York 10016.
Mu 7-8181.

Memorandum of Decision and Order.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL NO. 66-1052-WPG

ARDELL LEE, et al.,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Two enlisted men of the United States Marine Corps, on active duty, were in process of being transferred to Viet Nam, and for that purpose they were placed on board an airplane operated by the Military Air Transport Service, United States Air Force. In the course of taking off from the El Toro Marine Corps Air Station, California, to begin the overseas flight, the airplane crashed, and the two servicemen, along with many other people, were killed. Their personal representatives bring this action under the Federal Tort Claims Act, 28 U.S.C. sections 1346(b) and 2671 et seq. The complaint makes no charge against the Marine Corps or against MATS; it alleges, instead, that the crash was caused by the negligence of the Federal Aviation Agency in operating, maintaining and controlling the departure of the aircraft from the ground and in giving inadequate terrain clearance information.

The Government has moved to dismiss the action on the ground that, as a matter of law, the facts here concerned preclude recovery under the Tort Claims Act. The issue thus raised has been briefed by both sides, argued orally and submitted to the Court for decision.

The position of the Government is well summarized by the following sentence from Justice Jackson's opinion in *Feres* v. *United States,* 340 U. S. 135, 146 (1950):

> "We conclude that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."

If this is a correct statement of the law, the case at hand must be dismissed, because the deaths of the two servicemen clearly were in the course of activity incident to their service with the Marine Corps.

However, for reason hereinafter set forth, it is my conclusion that the above quoted sentence is no longer authoritative, that under present law these plaintiffs are not precluded from seeking relief under the Federal Tort Claims Act, and that the motion to dismiss must therefore be denied.

The terms of the statute, itself, give no indication that servicemen injured under the circumstances here concerned are to be deprived of the benefits of the Act. On the contrary, the fact that section 2680 specifically excludes "Any claim arising out of the combatant activities of the military or naval forces . . . during time of war" and "Any claim arising in a foreign country," would seem to indicate an intention to permit servicemen to assert claims arising in this country and not related to combatant activities. In this respect, the same conclusion was asserted by Justice Murphy, in speaking for the Court in *Brooks* v. *United States,* 337 U. S. 49 (1949). He pointed out that the Tort Claims Act, with the exceptions therein specified, provides for District Court jurisdiction over any claim for personal injury or death founded upon negligence, and he expressed disbelief that " 'any claim' means 'any claim but that of servicemen'." He also said that "It would be absurd to

believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain." (Page 51.)

In *Brooks,* two servicemen were riding in their automobile with their father along a public highway in North Carolina. They were doing so for their own purposes and presumably were on pass or furlough. One was injured and the other was killed when their car was struck by a United States Army truck. The Supreme Court held that the plaintiffs' action under the Tort Claims Act had been well founded.

In the course of his opinion in *Brooks,* Justice Murphy acknowledged that to adhere to the literal language of the statute and allow recovery to servicemen irrespective of how their injuries related to military service, might bring about outlandish results that Congress clearly would not have intended. "A battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, . . ." occurred to the Court as examples in which the allowance of recovery would be incongruous. However, the opinion emphasized that the accident to the Brooks brothers had nothing to do with their military careers, and it asserted that the Court withheld comment as to a case involving an accident incident to such service.

Feres v. *United States,* 340 U. S. 135 (1950) was just such a case; actually there were three combined cases. In one, a soldier was quartered in barracks that should have been known to be unsafe because of a defective heating plant, and he died in the ensuing fire. The other two cases involved negligence by army surgeons in the course of medical operations upon servicemen. In each of the three instances recovery was sought under the Federal Tort Claims Act and the Supreme Court denied relief.

Justice Jackson wrote the opinion of the Court. He noted at the outset that three cases had in common the

fact that ". . . each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." (Page 138.)

It is to be noted that the first of these quoted circumstances distinguishes the *Feres* case from *Brooks,* and the second distinguishes *Feres* from the case at hand. However, throughout the balance of his opinion, Justice Jackson ignored the latter aspect of the factual proposition that he had expressed, and he considered the only question to be whether the Tort Claims Act extends its remedy to any serviceman who receives injury incident to his military service. He answered this question in the negative, and we now consider the reasons given for such conclusion and how they have survived subsequent examination by the Supreme Court.

1. The opinion in *Feres* reasoned that the primary purpose of the Tort Claims Act was to provide a remedy to those who had been without, as reflected in the large number of private bills that had stemmed from torts suffered at the hands of Government employees; that there had been no large number of private bills on behalf of military personnel, because they and their dependents had already been given a comprehensive system of relief; and that it therefore followed that Congress had not intended to benefit servicemen in the passage of the Tort Claims Act. Similarly, it was suggested that Congress presumably would not have intended to permit servicemen to have double recovery, and that therefore the failure of the Tort Claims Act to provide for adjustment between the relief therein granted and the military disability and death benefit system, indicated that the latter is to be the exclusive remedy.

This argument was specifically rejected four years later in *United States* v. *Brown,* 348 U. S. 110 (1954). There, a veteran had received a service connected injury to his knee,

for which he was receiving compensation. The need for a further operation arose, and in the course of performing such operation the doctor in the Veterans Administration hospital negligently caused serious further and permanent damage to the patient's leg. The Supreme Court held that recovery under the Tort Claims Act should be allowed. The opinion referred to the decision in *Brooks* as having concluded ". . . that Congress had given no indication that it made the right to compensation the veteran's exclusive remedy, that the receipt of disability payments under the Veterans Act was not an election of remedies and did not preclude recovery under the Tort Claims Act but only reduced the amount of any judgment under the latter Act." The next sentence stated: "We adhere to that result." (Page 113.)

Likewise, in *United States* v. *Muniz,* 374 U. S. 150, 160 (1963), Chief Justice Warren, in speaking for the Court said that ". . . the presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence" under the Tort Claims Act. Cf. *United States* v. *Demko,* 35 U.S. L. Week 4028 (U.S. Dec. 5, 1966).

2. Another argument that was persuasive in *Feres* was that the Tort Claims Act (in section 2674) provides that "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances. . . ." The opinion reasoned that since private individuals do not maintain military establishments and therefore are not subjected to claims even remotely analogous to those at issue, the statute precluded recovery for the latter claims.

This argument was specifically rejected in *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), which allowed recovery for damages resulting from the grounding of a tug due to the negligence of the Coast Guard in the operation of a lighthouse. Justice Reed dissented on the ground

that the majority decision had rejected the doctrine of the *Feres* case.

3. Justice Jackson, in *Feres,* also considered it significant that the Tort Claims Act "... makes '... the law of the place where the act or omission occurred' govern any consequent liability." (340 U.S. at 142.) He then reasoned that it would not be rational to cause recovery by a serviceman to be governed by the laws of the place where the injuries occurred, inasmuch as he has no control over where his military duties might take him.

Inmates of federal penitentiaries, likewise, have a considerable lack of discretion with respect to the states in which they dwell. But this did not prevent the Court from holding that two such prisoners might recover under the Act for injuries that they sustained due to the negligence of supervisory personnel. *United States* v. *Muniz,* 374 U.S. 150 (1963). In the course of his opinion for the Courts, Chief Justice Warren adverted to the *Feres* reasoning that is summarized in the preceding paragraph. He thereupon rejected it, concluding with the comment that although the nonuniform right to recover because of varying state laws might possibly prejudice some prisoners, "... it nonetheless seems clear that no recovery would prejudice them even more." (Page 162.)

Although the opinion in *Muniz* expressly stated that the Court found no occasion to question *Feres,* so far as military claims were concerned, it proceeded to discredit or express lack of enthusiasm for each of the reasons upon which the doctrine of that case was founded. Chief Justice Warren concluded his discussion of *Feres* as follows:

> "In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that

might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . .' *United States* v. *Brown,* 348 U. S. 110, 112.'' (374 U. S. at 162.)

Thus, we have an explanation of *Feres* that provides the only authoritative and satisfactory basis for the decision that I have been able to find. It would follow therefrom that the exclusion of military personnel from recourse to the Act would not depend upon whether they were on active duty or on leave at the time of their injuries. Instead, it would depend upon whether or not the injuries stemmed from activities that involved an official military relationship between the negligent person and the claimant. If so, the claimant would be precluded; otherwise, he would not. That relationship did exist in *Feres,* and recovery was not allowed. The same was true in *Archer* v. *United States,* 217 F. 2d 548 (9th Cir. 1954), cert. denied 348 U. S. 953 (1955), in *O'Brien* v. *United States,* 192 F. 2d 948 (8th Cir. 1951), and in *Van Sickel* v. *United States,* 285 F. 2d 87 (9th Cir. 1960). Such relationship was not present in *Brooks* or in *Brown,* in which the claimants prevailed. Thus, all of the decided cases are in harmony with this test, with the following exception.

Callaway v. *Garber,* 289 F. 2d 171 (9th Cir. 1961) involved a situation in which three Air Force sergeants were under orders directing them to go from South Dakota to Seattle, Washington to attend a special service school. They properly chose to make the trip together by private automobile, and while doing so their car was struck by another automobile driven by a recruiting officer of the United States Navy while on official business. One of the three sergeants was killed, and his next of kin brought suit under the Tort Claims Act. The Court of Appeals affirmed the denial of recovery. The opinion, by Judge Orr, set out the hereinabove quoted ''explanation'' of the *Feres* decision and very aptly observed that those reasons.

had no relevance to the case at hand, since the official activities of the negligent party and those of the injured parties were entirely unrelated. The opinion then concluded by stating:

> "However, the instant case does fall within the rule of the Feres case as promulgated, and we must adhere to said rule since it was in no way negated or modified by the later Brown case." (Page 174.)

It seems to me that the negation of the *Feres* rule, for which Judge Orr somewhat wistfully was looking, has been provided by the later *Muniz* decision.

In the present case the two servicemen were killed in the course of their official relationships with the Marine Corps and with MATS. But the Federal Aviation Agency, whose alleged conduct is the only target of this action, is not a part of the military. It is an administrative agency created by Congress and given the responsibility of establishing and operating air navigation facilities and procedures for efficient air safety and traffic control. 49 U.S.C. section 1341 et seq. Such responsibility extends to all airports, civil as well as military. As far as the FAA was concerned, the decedents simply were two passengers in an airplane, just as in *Brooks* the two claimants were in the same position as any other motorist on the highway. Applying the test that I have derived from the hereinabove quoted "explanation" of the *Feres* decision, it follows that recovery by the present plaintiffs under the Tort Claims Act may not be foreclosed to them if they can prove the negligence that they allege.

The defendant's motion to dismiss the action is denied, and the defendant is given twenty days within which to answer the complaint.

DATED: December 15, 1966.

William P. Gray
WILLIAM P. GRAY
United States District Judge

SUPPLEMENT

Sheppard v. *United States*

Proceedings in the United States District Court,
Eastern District of Pennsylvania

subsequent to

denial of petition for certiorari,
386 U. S. 982 (1967)

S1

Complaint.

In the

UNITED STATES DISTRICT COURT,

For the Eastern District of Pennsylvania.

Civil Action No. 42958

Joseph B. Sheppard, Sr., Administrator of the Estate of Joseph B. Sheppard, Jr., 544 East Allegheny Avenue, Philadelphia, Pennsylvania,

and

Anthony G. Moccia, Administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr., 2021 Rittenhouse Square, Philadelphia, Pennsylvania,

v.

United States of America.

Jury Trial Waived

1. Plaintiff, Joseph B. Sheppard, Sr., who is the duly appointed Administrator of the Estate of Joseph B. Sheppard, Jr., and is a citizen of the United States, residing at 544 East Allegheny Avenue, Philadelphia, Pennsylvania, and Anthony G. Moccia, who is the duly appointed administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr., and is a citizen of the United States residing at 2021 Rittenhouse Square, Philadelphia, Penn-

sylvania, bring each and all of the following counts of this action under the Federal Tort Claims Act, 28 USC §§ 1346(b), 2671 et seq. as hereinafter more fully appears.

2. At all times relevant hereto the defendant was the owner and operator of a C-135 aircraft, Serial No. 00373.

3. On or about June 25, 1965, decedents, Joseph B. Sheppard, Jr., William Bradley Breon and Michael J. Mondo, Jr., then members of the United States Marine Corps, boarded said aircraft as passengers.

4. As a result of the negligence, carelessness and recklessness of certain of defendant's civilian, non-military agents, servants, and employees, to wit, members of the United States Federal Aviation Agency, said aircraft crashed on June 25, 1965, in the state of California, shortly after takeoff from El Toro Air Force Base.

5. As a result of the aforementioned crash decedents, together with sixty-nine other passengers and a crew of twelve, were killed.

First Count

6. Paragraphs one to five above are incorporated herein by reference.

7. This action is brought by Joseph B. Sheppard, Sr., father of the decedent, Joseph B. Sheppard, Jr., and administrator of the decedent's estate, to recover damages incurred by himself and Edna Sheppard, mother of the decedent, as a result of the death of their son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

WHEREFORE, plaintiff claims damages from defendant in the amount of Three Hundred Thousand Dollars ($300,000.00).

SECOND COUNT

8. Paragraphs one to five above are incorporated herein by reference.

9. Plaintiff Joseph B. Sheppard, Sr., brings this action as administrator of the Estate of Joseph B. Sheppard, Jr., deceased, to recover damages suffered by the estate as a result of the death of Joseph B. Sheppard, Jr., including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant in an amount of Three Hundred Thousand Dollars ($300,000.00).

THIRD COUNT

10. Paragraphs one to five above are incorporated herein by reference.

11. This action is brought by Anthony G. Moccia, administrator of the Estate of William Bradley Breon to recover damages incurred by Rufus B. Breon, father of the decedent, and Alice Breon, mother of the decedent, as a result of the death of their son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

WHEREFORE, plaintiff claims damages from defendant in an amount of Three Hundred Thousand Dollars ($300,000.00).

FOURTH COUNT

12. Paragraphs one to five above are incorporated herein by reference.

13. Plaintiff Anthony C. Moccia, brings this action as administrator of the Estate of William Bradley Breon, deceased, to recover damages suffered by the estate as a result of the death of William Bradley Breon, including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant on each of the above counts in the amount of Three Hundred Thousand Dollars ($300,000.00).

FIFTH COUNT

14. Paragraphs one to five above are incorporated herein by reference.

15. This action is brought by Anthony G. Moccia, administrator of the estate of Michael J. Mondo, deceased, to recover damages incurred by Agnes Mondo, mother of the decedent, as a result of the death of her son, including loss of the earnings of the decedent up to the age of twenty-one, loss of support and loss of his services, comfort and society.

WHEREFORE, plaintiff claims damages from defendant in the amount of Three Hundred Thousand Dollars ($300,000.00).

SIXTH COUNT

16. Paragraphs one to five above are incorporated herein by reference.

17. Plaintiff Anthony G. Moccia, brings this action as administrator of the Estate of Michael J. Mondo, Jr., deceased, to recover damages suffered by the estate as a result of the death of Michael J. Mondo, Jr., including loss of earnings and earning power of the decedent and pain and suffering.

WHEREFORE, plaintiff claims damages from the defendant in the amount of Three Hundred Thousand Dollars ($300,000.00).

/s/ STEPHAN M. FELDMAN,
STEPHAN M. FELDMAN,
JOSEPH G. FELDMAN,
FELDMAN AND FELDMAN,
420 Six Penn Center,
Philadelphia, Pennsylvania,
Attorneys for Plaintiffs.

Of Counsel:

HY MAYERSON, Esq.,
Lewis Tower Bldg.,
Philadelphia, Pennsylvania.

Motion to Dismiss.

In the

UNITED STATES DISTRICT COURT,

For the Eastern District of Pennsylvania.

Civil Action No. 42958

Joseph B. Sheppard, Sr., Administrator of the Estate of Joseph B. Sheppard, Jr.; and Anthony G. Moccia, Administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr.,

Plaintiffs,

v.

United States of America,

Defendant.

Defendant, United States of America, by its attorney, Drew J. T. O'Keefe, United States Attorney for the Eastern District of Pennsylvania, moves this Court to enter an order dismissing plaintiffs' complaint with prejudice for the reason that there is a final valid judgment in favor of the defendant and against the plaintiffs on the same cause of action asserted in the complaint. The doctrine of *res judicata* bars this litigation.

Drew J. T. O'Keefe,
United States Attorney.
By /s/ Joseph H. Reiter,
Joseph H. Reiter,
Assistant United States Attorney.

Memorandum in Support of Motion to Dismiss.

In the

UNITED STATES DISTRICT COURT,

For the Eastern District of Pennsylvania.

Civil Action No. 42958

Joseph B. Sheppard, Sr., Administrator of the Estate of Joseph B. Sheppard, Jr.; and Anthony G. Moccia, Administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr.,

Plaintiffs,

v.

United States of America,

Defendant.

On June 24, 1966, plaintiffs herein instituted Civil Action No. 40541, similarly entitled as the present action, seeking damages for the deaths of three servicemen who were killed in a plane crash while they were on active military duty.

The decedents' deaths were allegedly caused by the negligence of "members of the United States Air Force and others." (Complaint in Civil Action No. 40541, par. 4)

The Government filed a timely motion to dismiss the complaint in Civil No. 40541 upon the ground that the Federal Tort claims Act does not permit suits against the United States for injuries to servicemen in the course of activities incident to their service. *Feres* v. *United States,* 340 U. S. 135 (1950). This Court, speaking through Judge Davis, dismissed the complaint, holding that plaintiffs' claims for relief were governed by the *Feres* decision.

Plaintiffs' appeal was dismissed by the Third Circuit *per curiam* in *Sheppard* v. *United States,* 369 F. 2d 272 (C. A. 3, 1966). The United States Supreme Court denied certiorari, 386 U. S. 982 (1967).

The complaint in the instant case is identical to the prior action both as to parties and cause of action, that is, plaintiffs seek remuneration from the Government for the deaths of the same three servicemen in the aforementioned crash. The only apparent difference in the pleadings is that in the instant action the plaintiffs allege the negligence of "certain of defendant's civilian, non-military agents, servants, and employees, to wit, members of the United States Federal Aviation Agency." (Complaint, par. 4)

Discussion

It is submitted that the complaint in the instant case is subject to dismissal under the well known doctrine of *res judicata.* As the Third Circuit pointed out in *Anselmo* v. *Hardin,* 253 F. 2d 165 (C. A. 3, 1958):

> A final judgment by a court of competent jurisdiction is *res judicata* as to the parties not only as to all matters litigated and determined by such judgment but also as to all relevant issues which could have been presented, but were not.

The doctrine applies to matters of jurisdiction as well as other issues and precludes further litigation of the same cause of action between the same parties. *American Surety Company* v. *Baldwin,* 287 U. S. 156 (1932). It has been held that the assertion of a different ground of relief will not avoid the bar of *res judicata. Miller* v. *National City Bank,* 166 F. 2d 723 (C. A. 3, 1948).

It is submitted that the plaintiffs herein have had their day in court. It was determined by this Court that they

could not maintain the action under the Federal Tort Claims Act by virtue of the Supreme Court's decision in the *Feres* case. The determination by the District Court was affirmed by the Court of Appeals and the Supreme Court declined to hear the case. As such plaintiffs have had a full and complete judicial determination of their alleged cause of action and have not prevailed. To allow them to maintain the instant action would be to condone circuity and multiplicity of actions which is not favored in the law.

Conclusion

For the reasons stated above, plaintiffs' complaint should be dismissed with prejudice.

Respectfully submitted,

Drew J. T. O'Keefe,
United States Attorney.
By: /s/ Joseph H. Reiter,
Joseph H. Reiter,
Assistant United States Attorney.

Of Counsel:

John F. Murray,
Department of Justice,
Washington, D. C.

Memorandum in Opposition to Defendant's Motion to Dismiss.

In the

UNITED STATES DISTRICT COURT,

For the Eastern District of Pennsylvania.

Civil Action No. 42958

Joseph B. Sheppard, Sr., Administrator of the Estate of Joseph B. Sheppard, Jr.; and Anthony G. Moccia, Administrator of the Estates of William Bradley Breon and Michael J. Mondo, Jr.,

Plaintiffs,

v.

United States of America,

Defendant.

Statement

On June 24, 1966, the present plaintiffs filed an action under the Tort Claims Act to recover for the death of three servicemen killed in the crash of an Air Force plane on June 25, 1965, in California. Defendant moved under Rule 12(b) to dismiss the complaint on the ground that "this Court lacks jurisdiction over the subject matter of this action and that the complaint fails to state a claim upon which relief can be granted."

On July 27, 1966, Judge Davis in a one sentence order granted defendant's motion on the ground that "plaintiffs' claims for relief are governed by *Feres* v. *United States*, 340 U. S. 135 (1950). On July 29, 1966, plaintiff appealed to the Court of Appeals, which on December 12, 1966, in a

brief per curiam opinion (369 F. 2d 272) affirmed the dismissal "by the District Court under Rule 12b, F. R. Civ. P. for lack of jurisdiction over the subject matter." Certiorari was subsequently denied (386 U. S. 982).

The present action was commenced on June 15, 1967, seeking recovery for the same three deaths. However, whereas the prior action was based on the alleged negligence of members of the United States Air Force, the present action is based on the alleged negligence of civilian employees of the Government.

The United States has moved for dismissal on the ground of res judicata.

On December 15, 1966, the Central District of California overruled the government's motion to dismiss in *Lee* v. *United States,* 261 F. Supp. 252 (C. D. Cal. 1966), a death action by a serviceman arising out of the same plane crash involved in the instant case. In the *Lee* case the sole basis of the suit was the alleged negligence of the F.A.A., and the California District distinguished *Feres* on that ground. An appeal is pending before the Ninth Circuit in the *Lee* case. Plaintiffs' present action seeks to take advantage of the distinction established by the *Lee* case.

Argument

The prior action brought by these plaintiffs having been dismissed for want of jurisdicton was not a decision on the merits and is not a bar to a subsequent suit where sufficient jurisdictional facts are alleged. *Swift* v. *McPherson,* 232 U. S. 51, 58 L. Ed. 499 (1913); *Wade* v. *Rogals,* 270 F. 2d 280 (3rd Cir. 1959); *Heinter* v. *United States,* 283 F. 2d 874 (Ct. Claims 1960).

Moreover, where judgment in the former action is on a demurrer to the complaint, the bar of res judicata extends only to the exact point raised and does not operate as bar to a second action on a different theory. *Wiggins*

Ferry Co. v. *Ohio & Miss. R. Co.,* 142 U. S. 396, 410, 35 L. Ed. 1055, 1060-61 (1891). See *Miller* v. *National City Bank of N. Y.,* 66 F. 2d 723, 727 (2d Cir. 1948), cited by defendant, where the Court noted that the dismissal of an action on a demurrer for a defect apparent on the face of the complaint is not a bar to a second action where the defect is cured.

In the original action brought by the instant plaintiffs the allegation was that the negligence was committed by members of the armed forces. The Court held that action to be barred under the *Feres* case. The present action alleges the negligence only of civilian employees of the United States, an entirely different situation. See *Lee* v. *United States,* 261 F. Supp. 252 (C. D. Calif. 1966).

Wherefore, defendant's motion should be overruled.

Stephen M. Feldman
Attorney for Plaintiffs

Order.

In the

UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

Civil Action No. 42958

Joseph B. Sheppard, et al.

vs.

United States of America.

And Now this 16th day of August, 1967, it appearing that the United States intends to move to dismiss the above captioned action on the ground of res judicata, and it further appearing that there is pending before the United States Court of Appeals for the Ninth Circuit an appeal in the case of Lee v. United States, the disposition of which will affect the disposition of the above captioned matter,

It is hereby ordered that all proceedings in the above captioned matter be stayed until a final determination has been made by the United States Court of Appeals for the Ninth Circuit in the case of Lee v. United States.

Weiner
U. S. D. J.